Supreme Court, U.S.
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No. 98-200

In The

Supreme Court of the United States

October Term, 1998

KENNETH HARPER, DANIEL GOMEZ, ABRAHAM DEL CARMEN and BRIAN RUSSELL,

Petitioners,

vs.

BLOCKBUSTER ENTERTAINMENT CORP., a Delaware Corporation merged into Viacom, Inc.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a private employer violates section 2000e-2 of Title VII by adopting and enforcing dress and grooming standards that among other things, require men, but not women, to keep their hair no longer than "two inches below the top of the collar."

2. Whether an employee discharged for violating a dress and grooming standard regulating hair length, states a claim for retaliation under section 2000e-3 of Title VII when the employee could not have had an objectively reasonable belief that the standard was an unlawful employment practice.

STATEMENT PURSUANT TO RULE 29.6

In the plaintiffs' complaint, they erroneously named "Blockbuster Entertainment Corporation" as the defendant. Blockbuster Entertainment Corporation no longer exists; the company was merged into Viacom Inc. on September 24, 1994. Nevertheless, Blockbuster has chosen not to contest this misnomer.

The true respondents in this case, Blockbuster Music Retail, Inc. and Blockbuster Videos, Inc., are wholly-owned subsidiaries of Viacom Inc. Neither of the respondents have any nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

The petitioners' brief contains several mischaracterizations of the factual and procedural background of the case. First, there is no evidence in the record below that employees other than the petitioners were terminated from their employment for non-compliance with the hair-length policy.

Second, the petitioners imply that only male employees were subject to grooming policies. In fact, there was a single "dress and grooming standard[]" for *all* employees, which in some instances announced different standards for men and women. For example, all employees had to wear "clean and unwrinkled khaki slacks"; women, but not men, were allowed to substitute khaki skirts. The grooming policy regulated the grooming and appearance of both sexes' hair, although the policy did not specifically address hair length for females.

Third, the petitioners' assertion that the male-hair-length policy is not a bona fide occupational qualification is gratuitous. As the court of appeals noted in their decision, this issue was never reached by the courts. Petition at 7a n.3.

Fourth, contrary to the petitioners characterization of the EEOC's involvement in this case, the EEOC did not "rule[] in their favor, [and] find[] that there was probable cause to believe Blockbuster had violated Title VII." Instead, as recognized by the court of appeals, the EEOC "concluded that successful litigation of male hair length cases would be virtually impossible." Petition at 6a (quoting the EEOC Compliance Manual). Accordingly, the EEOC ordered that all cases be closed and that right-to-sue letters be granted automatically. *Id.*

Fifth, the petitioners' summary discussion of the court of appeals decision does not completely reflect the court's decision. Because the decision is attached to the petition, however, a more detailed exposition will not be made here.

REASONS FOR DENYING THE WRIT

The Court should deny the petition because the court of appeals correctly applied the law governing claims of employment discrimination based on grooming policies, the circuit courts are undivided in their application of the law in this area, and the unanimous circuit court rulings are not at odds with the rulings of this Court. Further, because there is no objectively reasonable basis to believe the grooming policy in question is unlawful, the petitioners' claim of retaliation is meritless.

The law governing grooming policies in the Eleventh Circuit is well settled, "differing hair length standards for men and women do not violate Title VII." *Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998) (citing *Willingham v. Macon Telegraph Pub. Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975) (*en banc*); *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1209-10 (11th Cir. 1981) (adopting the rulings of its predecessor court)). Every circuit that has considered this issue has reached the same conclusion. *Tavora v. New York Mercantile Exchange*, 101 F.3d 907, 908 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 1821, 137 L. Ed. 2d 1029 (1997); *Longo v. Carlisle DeCoppet & Co.*, 537 F.2d 685, 685 (2d Cir. 1976); *Earwood v. Continental Southeastern Lines, Inc.*, 539 F.2d 1349, 1351 (4th Cir. 1976); *Willingham v. Macon Telegraph Pub. Co.*, 507 F.2d 1084 (5th Cir. 1975) (*en banc*); *Barker v. Taft Broadcasting Co.*, 549 F.2d 400, 401 (6th Cir. 1977); *Knott v. Missouri Pac. R. Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975); *Baker v. California Land Title Co.*, 507 F.2d 895, 898 (9th Cir. 1974); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1336 (D.C. Cir. 1973).

Notwithstanding these unanimous decisions, the petitioners argue that the reasoning in these cases is inconsistent with

current employment discrimination law as decided by this Court. Petition at 7. In support of this argument, the petitioners rely on three Supreme Court cases, *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 111 S. Ct. 1196, 499 U.S. 187, 113 L. Ed. 2d 158 (1991); *Newport News Shipbuilding and Dry Docks Co. v. EEOC*, 462 U.S. 669, 103 S. Ct. 2622, 77 L. Ed. 2d 89 (1983); and *City of Los Angeles, Dept. of Water and Power v. Manhart*, 435 U.S. 702, 98 S. Ct. 1370, 55 L. Ed. 2d 657 (1978); and argue that these cases adopt a simple "but for" test to determine whether there is discrimination under Title VII, 42 U.S.C. §§ 2000e, *et seq.*, ("Title VII") — i.e., whether but for the petitioners' sex they would have been treated differently by Blockbuster. And further that this test applies even when the alleged discrimination is based on sex plus a "mutable characteristic." Petition at 7-9.

The petitioners' argument that the law applied by the federal courts of appeals is inconsistent with more recent decisions of this Court, however, is incorrect. Not only are the Supreme Court cases cited by the petitioners factually distinguishable, but this Court implicitly rejected the petitioners' characterization of the law as recently as the 1997 term. For the reasons discussed below, the Court should again deny certiorari on the issues presently before the Court.

I.

THE LAW APPLIED BY THE CIRCUITS IS WELL REASONED

The petitioners seek to prohibit an employer from enforcing uniform and reasonable grooming standards for its employees on the grounds that Title VII prohibits all employment practices, including those associated with hair length, that are different for males and females. The drafters of Title VII did not intend,

however, to require identical grooming codes for men and women as part of the statutory goal of providing equal employment opportunities to both sexes. *See Willingham*, 507 F.2d at 1091 (recognizing that "grooming codes or length of hair is related more closely to the employer's choice of how to run a business than to equality of employment opportunity"). Instead, the drafters intended to provide "equal job opportunity" to the sexes. *Id.*

The federal courts of appeals have unanimously reached this same conclusion as to the drafters' intent. Some of the courts have reasoned that grooming policies are too insignificant to come under the ambit of Title VII. Others have found such policies lawful because they are directed at mutable, rather than biological, differences between the sexes. Further along these lines, some courts have reasoned that when, as here, the policies are not unreasonable and can be so easily complied with, it would frustrate common sense to outlaw such policies. All of these decisions are well reasoned and reach the same conclusion — Title VII was never intended to foreclose grooming policies. Any other interpretation of the statute would lead to absurd results.

For example, if a "but for" test was applied to *every* sex-plus-a-mutable-characteristic claim of discrimination, a private employer would be powerless to adopt and enforce any grooming and dress standards or practices that are customarily recognized by the sexes. *See Willingham v. Macon Telegraph Pub. Co.*, 352 F. Supp. 1018, 1020 (M.D. Ga. 1972), *aff'd*, 507 F.2d 1084 (5th Cir. 1975) (*en banc*). Yet, the petitioners assert that such an interpretation of Title VII is embodied in the three Supreme Court decisions discussed below.

II.

THIS COURT'S DECISIONS ARE FACTUALLY DISTINGUISHABLE

In *Johnson Controls* the employer adopted a policy that prohibited female employees capable of bearing children from working in jobs involving a high risk of lead exposure. This Court found that the policy constituted sex discrimination and that the employer's concern for the safety risk posed to unborn children did not constitute a bona fide occupational qualification sufficient to deny employment opportunities to women.

Unlike the hair-grooming policy involved in the petition before the Court, *Johnson Controls* involved discrimination based on the fundamental right to have children. *Johnson Controls*, 499 U.S. at 199 (recognizing that "discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex" (citations omitted)). As the *Willingham* court recognized,

> a line must be drawn between distinctions grounded on such fundamental rights as the right to have children or to marry and those interfering with the manner in which an employer . . . operate[s] a business.

507 F.2d at 1091. Nothing in *Johnson Controls* undermines the distinction made in *Willingham*.

In both *Newport News* and *Manhart*, the Court found discriminatory a company policy that provided significantly different pension and health benefits for male and female employees. As recognized by the court of appeals below, such benefits often represent a crucial component of an employer's

compensation. 139 F.3d at 1389. Thus, "the *practical effect* of denying or reducing such benefits on the basis of sex is to deny the employee an 'employment opportunity' on the basis of sex." *Id.* (emphasis added). In contrast, a hair-length policy has only a *de minimis effect* on employment opportunities because hair length is an easily altered or mutable characteristic. *See Tavora*, 101 F.3d at 908 (recognizing the trivial nature of a hair-length policy in contrast to pension and health policies); *Willingham*, 507 F.2d at 1091 ("Hair length is not immutable and . . . enjoys no constitutional protection."); *Dodge*, 488 F.2d at 1337 ("Title VII was never intended to encompass sexual classifications having only an insignificant effect on employment opportunities."). Again, the Court's opinions in *Newport News* and *Manhart* do not explicitly or implicitly alter the distinction drawn by the federal courts of appeal.

III.

THE RULE OF LAW APPLIED BY THE FEDERAL COURTS OF APPEALS IS NOT OUTDATED

Notwithstanding the petitioners' assertion that the decisions of the federal courts of appeals are outdated for drawing distinction between *de minimis* grooming policies on the one hand, and fundamental rights and effective denials of employment opportunities on the other, at least one circuit has revisited this very same issue since the Court's decisions in *Johnson Controls*, *Newport News* and *Manhart*.

In *Tavora* a male employee was terminated for violating a hair-length policy. As here, the employee filed a Title VII action and argued that the "but for" test enunciated in *Newport News* and *Manhart*, combined with the Court's "broad language" directed at eliminating gender-based discrimination, overruled the federal courts of appeals cases cited above. Likewise, the

employee argued that Title VII applied to all employment policies that treated men and women differently, regardless how trivial.

The Second Circuit rejected these arguments because, as here, the arguments did not reflect the factual context of this Court's decisions, which involved "employment policies resulting in significantly different levels of pension and health benefits for males and females." 101 F.3d at 908. Not satisfied with the court of appeals' decision, Tavora petitioned this Court for certiorari reasserting these claims. This Court denied certiorari last term. 117 S. Ct. 1821, 137 L. Ed. 2d 1029 (1997). And the Court should do so again.

IV.

A SUBJECTIVE, GOOD-FAITH BELIEF THAT AN EMPLOYER'S POLICY IS UNLAWFUL IS NOT ENOUGH TO ESTABLISH A STATUTORILY PROTECTED ACTIVITY

As the court of appeals recognized below, to establish a prima facie case of retaliation under Title VII, the employee must demonstrate:

> (1) that he engaged in statutorily protected activity;
> (2) that he suffered adverse employment action; and
> (3) that the adverse employment action was causally related to the protected activity.

139 F.3d at 1388. An employee's protest of an employer's lawful conduct is statutorily protected so long as the employee can demonstrate a good faith, *objectively* reasonable belief that the employer had unlawful employment practices. *Id.* (citing *Little v. United Technologies, Carrier Transicold Division*, 103 F.3d 956, 960 (11th Cir. 1997)).

Based on the unanimous decisions of the federal courts of appeals denying hair-length policy discrimination claims, and the distinguishable nature of the Supreme Court cases cited above, the court of appeals concluded that the petitioners did not have an objectively reasonable belief that the employer was engaged in unlawful employment practices. The petitioners argue that this standard is too severe. According to the petitioners an employee's protest of an employer's policies should be protected so long as the employee subjectively believes that the policy is discriminatory, "and seek[s] in good faith to change contrary decisions by the courts." Petition at 11.

The standard of review for retaliation claims offered by the petitioners represents no standard at all. An employee that disagreed with an employer's policy and long-standing judicial precedent upholding the policy, could protest publicly, disrupt the work environment, and refuse to comply with the policy without any fear of dismissal or other punishment. In contrast, the scope of statutorily protected activity established within the Eleventh Circuit affords an equitable degree of protection against retaliation. An employee need not show that the policy in fact violates the law; however, the employee must be able to demonstrate *a good-faith, objectively reasonable belief* that the policy is unlawful.

CONCLUSION

The Court should deny this petition for a writ of certiorari on both the petitioners' discrimination and retaliation claims.

The law is well settled in the circuits, and there is nothing in this Court's jurisprudence in the past 20 years that would seriously call into question the decisions of the federal circuit courts of appeals that an employer does not violate Title VII by adopting and enforcing reasonable hair- grooming standards, which include hair-length limits for men.

Further, the petitioners present no compelling argument on this record for the Court to review their claim of retaliation. Petitioners, no less than employers, must be charged with knowledge of the law, which in this case is clear beyond peradventure.

Respectfully submitted,

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